



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 14 2005

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Jan Witold Baran, Esq.
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

RE: MUR 5541
The November Fund and
Bill Sittmann, in his official capacity as
Treasurer

Dear Mr. Baran:

On October 1, 2004, the Federal Election Commission notified your clients, The November Fund and Bill Sittmann, in his official capacity as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information provided by your clients, the Commission, on March 8, 2005, found that there is reason to believe that The November Fund and Bill Sittmann, in his official capacity as Treasurer, violated 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a) of the Act. At the same time, the Commission also found that there is no reason to believe that your clients violated 2 U.S.C. §§ 434(f), 441a and 434 of the Act with regard to allegations concerning the reporting of electioneering communications and in-kind contributions in the form of coordinated expenditures. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information. Please note that Respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of these matters. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Submit Written Answers in MUR 5541 must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. In the absence of additional information, the Commission may find probable cause to believe that violations have occurred and proceed with conciliation.

28044210688


If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Audra Wassom, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis
Subpoena and Order

28044210689

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: The November Fund and
Bill Sittmann, Treasurer;

MUR: 5541

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Citizens for Responsibility and Ethics in Washington ("CREW"). Complainant alleges that The November Fund violated the Federal Election Campaign Act of 1971, as amended ("the Act") by failing to register and report as a "political committee," by paying for electioneering communications with funds from sources prohibited under the Act, and by making coordinated expenditures that resulted in in-kind contributions to the Bush-Cheney '04 campaign and its campaign manager, Ken Mehlman. The evidence demonstrates that there is reason to believe that The November Fund violated the Act by failing to register and report as a "political committee." However, there is no evidence at this time that The November Fund made electioneering communications or coordinated expenditures. Accordingly, the Commission finds reason to believe that Respondents violated sections 433, 434, 441a(f), and 441b(a) of the Act, but the Commission finds no reason to believe that Respondents violated section 434(f) of the Act by making and failing to report electioneering communications or that The November Fund violated the Act by making prohibited, in-kind contributions via coordinated expenditures to Bush-Cheney '04 or Ken Mehlman.

28044210690

II. FACTUAL AND LEGAL ANALYSIS

A. Background

The November Fund was formed in August of 2004 pursuant to section 527 of the Internal Revenue Code.¹ The group has not registered as a political committee with the Commission, nor is it associated with a registered political committee. The November Fund conducted its activities with nonfederal funds raised outside the limitations and prohibitions of the Act, including \$3 million from the U.S. Chamber of Commerce, an incorporated non-profit trade association, which constituted 95% of The November Fund's 2004 receipts.

Public statements made by individuals with The November Fund and the Chamber indicate that the group was formed in reaction to the selection of Senator John Edwards as the Democratic nominee for Vice President.² The November Fund has

¹ Its stated purpose on its Form 9871 is "to engage in political activities that educate the general public regarding the public policy positions of candidates for federal, state, and local office and mobilize voters in compliance with federal and state laws."

² In October, Bill Brock, co-chair of The November Fund, made the following statement: "Kerry's selection of Edwards was such an arrogant act, such an in-your-face thing that we had to do something." Greg Pierce, *Inside Politics*, The Washington Times, Oct. 11, 2004, at A05. And the press, at least, was under the impression that The November Fund intended from its inception to run television ads featuring John Edwards. "Brock's group, which is supported by the pro-business U.S. Chamber of Commerce, said Tuesday it plans to air ads within a month urging legal limits on lawsuit awards and criticizing trial lawyers, including Edwards." Sharon Theimer, *Private groups find loophole in campaign law*, Daily Herald, Aug. 25, 2004, at www.harktheherald.com; *see also*, Sharon Theimer, *Non-party groups air hard-hitting ads using exemption from new campaign law*, NCTimes.com, Nov. 1, 2004, at www.nctimes.com. A press release issued by The November Fund on August 24, 2004 contained the following statements (emphasis added):

"A new 527 political organization announced today that it will conduct a campaign to 'tell the truth about trial lawyers' including a discussion of John Edwards' legal career."

"Fuller, who served as Chief of Staff to Vice President Bush, said the organization will *focus on key battleground states* and will 'educate voters how much the actions of trial lawyers cost our

28044210691

provided no explanation for the choice of its name, although its communications reference the Presidential election, which occurred on November 8, 2004. Ken Rietz, Chief Operating Officer of Burson-Marsteller at the time, who founded The November Fund, started the group to "emphasize the need for litigation reform and educate the public about the positions of officeholders on that subject." Chamber Resp. at 2. In fact, The November Fund's 2004 activities were limited to attacking and opposing John Edwards, and his running mate John Kerry, for their positions on tort reform.

The November Fund has two websites. The first, www.thenovemberfund.org, only contains information about the group and the co-chairs of the group, William Brock and Craig Fuller, and an opportunity to contribute online. At the bottom of that webpage there is a direction to "Visit Our Website: www.thetruthabouttriallawyers.com." It is this second website that contains the group's message and substantive content and is almost entirely focused on criticism of one federal candidate, Senator John Edwards. See Appendix A.

The "Truth About Trial Lawyers" site contains numerous references to the Kerry-Edwards campaign including a history of Edwards' political life and his presidential campaign. The website's clear message is that if Kerry-Edwards are elected the reader will not be able to get or afford health care. Furthermore, The November Fund had the following ad on its website:

Warning!!!! John Edwards may be hazardous to your health.

economy over \$200 Billion a year. The health of our economy is an important issue *in this election.*"

28044210692

I wish you could know John Edwards the way we know him here in North Carolina. The truth is John Edwards made North Carolina a much more dangerous place to be sick. ... Demand John Edwards tell his friends to stop suing our doctors, abusing our courts and wrecking our economy.

In addition to its website, The November Fund ran internet ads using "pop-up video" attached to the AOL Instant Messenger program.³ The pop-up ads ran from September 24th through Election Day, according to The November Fund's spokeswoman, Shelley Hymes.⁴ The internet ads would appear when an AOL Instant Messenger user signed into the program. An image of John Edwards would appear above the user's buddy list, then the video would start in a pop-up window. The video showed John Edwards' face "while a female voice said, 'Personal injury lawyers like John Edwards get rich, but you pay the price.'"⁵ At least one of the pop-up ads, "feature[d] a sallow-looking headshot of Democratic vice presidential candidate Sen. John Edwards, gazing across a wall-to-wall field of \$50 and \$100 bills. The text reads, 'Learn the Truth About John Edwards' and offers viewers the chance to click on a link," and that link would take them to The Truth About Trial Lawyers website.⁶

The November Fund also sent out an unknown number of direct mail pieces stating: "Doctors are leaving, hospitals are closing, health care costs are skyrocketing at

³ So-called "pop-up" ads on the internet are similar to commercials on television and appear without any action having been taken by the user/viewer.

⁴ Leslie Walker, Pop-Up Videos Hit Instant Messengers, Newsbytes News Network, Oct. 31, 2004, at 2004 WL 97512929; Robert MacMillan, Instant Messenger Delivers Political Pop-Ups, washingtonpost.com, Oct. 27, 2004.

⁵ Web saturated with campaigning, Chicago Tribune (from Wash. Post), Nov. 2, 2004, at 2004 WL 97455738.

⁶ Robert MacMillan, Instant Messenger Delivers Political Pop-Ups, washingtonpost.com, Oct. 27, 2004.

28044210693

an alarming rate. ... Tell Sen. Kerry and Sen. Edwards that it is time to support common-sense lawsuit-abuse reform."⁷

The November Fund claims not to have run any broadcast, cable, or satellite television ads or radio ads identifying a federal candidate.⁸ No electioneering communication reports have been filed by The November Fund with the Commission. The group admits that other forms of communication, such as its website, print advertisements, and mass mail pieces, identify Senator John Edwards, but none of the Respondents have provided any samples of the mass mailings or transcripts of phone calls. The November Fund Resp. at 2, 11; Chamber Resp. at 3.

Even though the issue of tort reform has been on the public stage in the months following the election, The November Fund does not appear to have been active in any non-election related efforts. It has not changed any of the content on its website, which still features John Edwards and discussion of the Kerry-Edwards campaign.⁹ Rietz, director of The November Fund, commented that "Burson has a policy of not being involved in candidates' campaigns in any way, so I took a leave of absence so the

⁷ Greg Pierce, Inside Politics, The Washington Times, Oct. 11, 2004, at A05; see also Democratic VP hopeful takes spotlight in US presidential race, Agence France Presse, Oct. 10, 2004, at 2004 WL 95429127.

⁸ Several news articles state, at the very least, the group at one time intended to run such ads, and a transcript of the Kudlow & Cramer show on CNBC from September 15, 2004, contains an "excerpt from TV commercial" by The November Fund that clearly identifies Senator John Edwards.

⁹ Also, the e-petition The November Fund urged the viewer to sign on its website to "Tell John Edwards to urge his friends to: Stop suing our doctors! Stop abusing our courts! Stop wrecking our economy!" is no longer a valid action on the website. One of the stated uses for the information collected from people who signed the e-petition was for The November Fund and "other like-minded tort-reform organizations" to be able to send the e-petition signer "periodic updates on this critical issue."
www.thetruthabouttriallawyers.com.

28044210694

company would not be involved." According to the same article in which Rietz was quoted, *"Rietz added that he will return to Burson following the election in November."*¹⁰

The Chamber of Commerce is an incorporated non-profit trade association that provides various benefits to its members, which include various forms of businesses but principally corporations. The Chamber represents its members before Congress, holds program and networking events, provides litigation support, provides research and issue briefing, and has member discounts. As previously stated, the Chamber provided \$3,000,000 to The November Fund between August and October of 2004.¹¹ The Chamber is by far the group's largest contributor having provided over 95% of The November Fund's revenues. Suzanne Clark, the Chamber's Executive Vice-President and Chief Operating Officer, served on The November Fund's advisory board. The Chamber's response indicates that she had no "day-to-day responsibilities for [The November Fund's] operations" however. Chamber Resp. at 4. The Chamber has denied that any of its other officers or employees were involved with The November Fund.

The November Fund sent the Chamber an initial solicitation letter, which did not mention a federal election or federal candidate on August 16, 2004. On August 25th, the day after The November Fund issued a press release that clearly referenced John Edwards and the federal election, the Chamber made its first contribution of \$500,000. It made subsequent contributions totaling \$3 million and issued its own press release entitled

¹⁰ Douglas Quenqua, *US Chamber Helping Form Alliance Critical of Edwards' Law Career*, PR Week, Aug. 30, 2001 (emphasis added).

¹¹ The November Fund appears to have started with an initial \$500,000 contribution from the Chamber on August 25, 2004. The Chamber then made contributions of \$500,000 on September 27, 2004 and \$2,000,000 on October 1, 2004 respectively.

28044210695

"U.S. Chamber Enters Political Debate for Next White House" discussing this "make-or-break election."¹² One press report stated:

Chamber president Thomas Donahue had warned Democrats earlier this year that his group would drop its 'customary neutrality' in order to *campaign against Edwards* if he were selected as John Kerry's running mate. The Chamber still does not intend to make an official endorsement, he said, *but will act aggressively through The November Fund to assure Bush's re-election.*¹³

In describing the Chamber's involvement with The November Fund, Tom Donohue, President of the Chamber, said "We are going to run a campaign that says there is a runaway legal system in this country. We have an acute problem here. *If Edwards*

¹² The August 24th press release stated (emphasis added):

Washington, D.C. – The United States Chamber of Commerce announced it would participate in two new political initiatives to educate voters about the devastating impact of a runaway legal system on the American way of life –during this fall's presidential campaign.

"We cannot ignore what may prove to be a *make-or-break election* for legal reform *at the national level*," said Thomas Donohue, Chamber President and CEO. "*When voters go to the polls, they need to know* lawsuit abuse destroys jobs, drives doctors out of business and forces companies into bankruptcy. The *extraordinary circumstances surrounding this election* have compelled us to support two important new initiatives."

The Chamber is joining others in supporting a new 527 Group called *The November Fund*, which aims to raise public awareness about lawsuit abuse. The group is co-chaired by Craig Fuller, former chief-of-staff to Vice President Bush, and Bill Brock, former Senator and Republican National Committee Chair.

This team has identified seven battleground states where there is the greatest potential to effectively educate voters through a concerted program of TV, radio and print advertising and direct mail, an Internet campaign, and earned media discussing the truth about trial lawyers.

A subsequent cnn.com-Inside Politics story from August 25, 2004 reported that "[t]he U.S. Chamber of Commerce plans to run TV ads attacking the former trial attorney [John Edwards] through a new political organization called the November Fund. The ads will run in seven states where polls show a tight race between Kerry and Bush, the chamber said last night in an e-mail statement." John Mercurio, *Still talking swift boats*, cnn.com, Inside Politics, Aug. 25, 2004.

¹³ Douglas Quenqua, US Chamber Helping Form Alliance Critical of Edwards' Law Career, PR Week, Aug. 30, 2004 (emphasis added).

*ends up in the second most important job in the government, he will influence the appointment of at least a thousand people in the government, and he will be a party to naming the next four justices on the Supreme Court."*¹⁴

In a subsequent December 6, 2004 letter to the Chamber's board of directors, Tom Donohue stated (emphasis added):

As for the presidential race, the Chamber did not endorse in the election, but executed a voter education and get-out-the-vote effort, as well as provided significant support to the November Fund because we believed that the prospect of having a trial lawyer a heartbeat away from the presidency would influence our legal, judicial, and regulatory environment for years to come.

The November Fund targeted four states in particular – West Virginia, Iowa, New Mexico, and yes, Ohio. Obviously many factors influence the *outcome of a presidential election*. I would only note that all four states targeted by the November Fund ended up in the Bush column.¹⁵

B. Analysis

1. Political Committee Status

As a Section 527 organization, The November Fund is by law "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political

¹⁴ Alan Murray, Republicans Form '527' Group to Run Anti-Edwards Spots, Wall Street Journal, Aug. 24, 2004, at www.wsj.com (emphasis added).

¹⁵ <http://www.smartbrief.com/hosted/c100/c100-president-letter.pdf>.

organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year.¹⁶ 2 U.S.C. § 431(4)(A). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). See, e.g., *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation "leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year," proceeds from that solicitation are contributions).

The activities of The November Fund clearly show that at least some of its activities were aimed at defeating John Edwards in the federal election. The name alone, "The November Fund," contains an obvious reference to the November federal election. The director of the group only took a temporary leave of absence from his position at Burson Marsteller to start and head the group until the November election was over,

¹⁶ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986).

28044210698

stated explicitly that he was doing so in order not to involve Burson Marsteller the election, and then planned to return to his position at Burson. And the group appears to have ceased its activities since the election.

The group's public statements and press releases would very likely lead a potential contributor to believe his or her contribution would be used to oppose one specific federal candidate.¹⁷ Given the activities of The November Fund and the amount of money it accepted and expended, reasonable inferences suggest The November Fund may have accepted \$1,000 in contributions or made \$1,000 in expenditures and therefore should have registered with the Commission and filed reports as a political committee. This warrants further investigation.

The November Fund's website (www.thetruthabouttriallawyers.com) is devoted to criticizing Sen. Edwards and his policies surrounding tort reform and health care, and the site asks the viewer to "Sign the E-Petition! Tell John Edwards to urge his friends to: Stop suing our doctors! Stop abusing our courts! Stop wrecking our economy!" While the website itself is still available, the two commercials located on the website that clearly identified John Edwards, and to which some of the AOL pop-up commercials

¹⁷ Bill Brock, co-chair of The November Fund, appeared on the CNBC show, Kudlow & Cramer, on September 15, 2004. The lead-up to his appearance was "And later on, the Republicans take aim at trial lawyers and at John Edwards, in particular. We'll be talking to former Senator Bill Brock. He's going to be giving us a first look at the new ad that's coming from the November Fund." Then Mr. Brock made the following statement on the show:

We've just simply got to address this issue, and the fact that the Democrats would put John Edwards on their ticket is such an in-your-face action to the American people, like "We don't care what you think. We're just going to go ahead and refuse to have any reform whatsoever of the tort system." And that's an issue the people need to know about.

Just prior to Mr. Brock's interview, in which the above statement was made, one of the commercials from the group's website was previewed. It was a commercial that clearly identified John Edwards.

28044210699

28044210700

directed viewers, have been pulled off the website since the election.¹⁸ The site content (with numerous references to Senators John Kerry and John Edwards and the Kerry-Edwards campaign) would lack relevance after the election. Also, as previously mentioned, the e-petition feature no longer appears to be active. The fact that the commercials have been pulled from the website lends support to the argument that the group's focus was to influence a federal election.

The November Fund's Post-Election Form 8872 reveals total payments of \$200,000 to one vendor for "internet advertising" easily surpassing the \$1,000 threshold for political committee status. Therefore, if the contents of the group's web activities, including its websites, the commercials that were available on the website, and the pop-up commercials that ran on AOL Instant Messenger, constituted expenditures, then The November Fund would be a political committee under the FECA. 2 U.S.C. § 431(4); 11 C.F.R. § 100.5.

If The November Fund is a political committee, then it is subject to the registration and reporting requirements, as well as the contribution limitations and source prohibitions, of the Act. See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. Based on the information available, there is sufficient evidence to investigate whether The November Fund accepted \$1,000 in contributions or made \$1,000 in expenditures. Therefore, the Commission finds reason to believe that The November Fund violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee

¹⁸ The Commission is not sure when the commercials were pulled off the site. They remained on the site for some period after the election but were pulled apparently sometime between the last week or two of November and December 9, 2004.

with the Commission; by failing to report its contributions and expenditures; by knowingly accepting contributions in excess of \$5,000; and by knowingly accepting corporate contributions.

2. Electioneering Communications

An electioneering communication is a broadcast, cable, or satellite communication that clearly identifies a federal candidate within 60 days before the general election. 11 C.F.R. § 100.29(a). Although The November Fund made communications that clearly identified John Edwards within 60 days before the general election, The November Fund denies having made any electioneering communications and there is no evidence to suggest that any of these communications were by means of broadcast, cable, or satellite. Thus it appears that The November Fund sponsored no communications that would qualify as an electioneering communication. Therefore, the Commission finds no reason to believe The November Fund violated 2 U.S.C. § 434(f) by failing to report electioneering communications.

3. Coordinated Expenditures

Complainant cites the April 19, 2004 meeting of trade associations to discuss GOTV practices and the long history of the founders of The November Fund, Ken Rietz, William Brock, and Craig Fuller, with the Republican Party and the Bush administration as the basis for contending there was coordination between The November Fund and Bush-Cheney '04. The April 19, 2004 meeting at the Chamber to discuss GOTV practices was attended by various trade associations. Ken Mehlman, campaign manager for Bush-Cheney '04, and Ed Gillespie, chairman of the RNC, attended and gave

28044210701

speeches. It appears that Mary Beth Cahill, campaign manager for Kerry for President, and Terry McAuliffe, chairman of the DNC, were invited to attend, and that the Kerry campaign was represented at the meeting by Tad Devine. Respondents claim that November Fund officials, Ken Rietz, William Brock, Craig Fuller, or Suzanne Clark did not attend the meeting.

For a communication to be coordinated, it must be paid for by someone other than the candidate or the candidate's authorized committee, it must satisfy one of the "content" standards, and it must satisfy one of the "conduct" standards. 11 C.F.R. § 109.21(a). It seems quite likely The November Fund issued public communications through newspapers, mass mailings, telephone banks, or other means that meet one of the content standards by clearly identifying John Edwards within 120 days before the election.¹⁹

There is no evidence, however, that The November Fund engaged in any conduct that would satisfy one of the conduct standards. Since it appears that there were no November Fund officials at the April 19th meeting and The November Fund was not yet formed at that time, there is no evidence that a request or suggestion was made by the campaign, or substantial discussion or material involvement occurred by the campaign at that meeting regarding any future communications by The November Fund. 11 C.F.R. § 109.21(d)(1)-(3). There is also no evidence The November Fund and Bush-Cheney '04 used a common vendor, that The November Fund hired a former employee or

¹⁹ In fact, in its response, The November Fund admitted to issuing print advertisements and mass mail pieces that identified Sen. Edwards. The November Fund Resp. at 2, 11; Chamber Resp. at 3.

independent contractor of the campaign, or that The November Fund's communications included the dissemination, distribution, or republication of Bush-Cheney '04 campaign materials. 11 C.F.R. § 109.21(d)(4)-(6).

Therefore based on the information ascertained thus far, the Commission finds no reason to believe that The November Fund violated 2 U.S.C. §§ 441a and 434 by making and failing to report excessive contributions in the form of coordinated expenditures, to Bush-Cheney '04, Inc.

28044210703